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STATE OF WASHINGTON
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Supreme Court No. 82192-5

IN THE WASHINGTON SUPREME COURT

THE CITY OF SEATTLE, a municipal corporation,

Respondent/Plaintiff,

v.

ALBERT HEGLUND, JR., AND HELENE HEGLUND, husband and wife; WEST MARINE FINANCE COMPANY, INC.; WEST MARINE PRODUCTS, INC.; A HEGLUND JR. DBA A H PROPERTIES; and KING COUNTY, a subdivision of the state of Washington.
Defendants/Appellants,

REPLY BRIEF OF APPELLANT WEST MARINE PRODUCTS, INC.

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I. INTRODUCTION

Indeed. This case is curious. Here, it is undisputed that the City of Seattle ("City") requires private funding for a public project and steadfastly refuses to disclose any information regarding such private funding or what benefit such private financing sources will obtain for their participation in this public project. Quiet honestly, West Marine cannot find a reported case in the Union where such a factual situation was presented to a court for decision.

Nor should there be. The notion that a governmental agency will use private funding for a public project for which the power of eminent domain is used, without disclosing the terms of such an arrangement is contrary to the protections afforded property owners and possessors by the Washington Constitution and the statutes relating to eminent domain. The City's bold action in bringing this case to the courts with the acknowledged and undisclosed private participation is a risky move. The argument that the lack of such a reported case renders West Marine's argument frivolous is simply incorrect. Like *King County v. Theilman,* 59 Wn.2d 586, 369 P.2d 503 (1962), the facts of this case are bizarre, if not unique. *Id.* at

595-96. The trial court should be reversed and the matter dismissed. The City is always free to reinitiate its action with the proper presentation of evidence regarding the private participation at the public use and necessity stage.

II. ARGUMENT

A. THE CITY HAS ADMITTED THAT IT HAS FAILED TO MEET ITS BURDEN OF PROOF

At no time in its response does the City contend that it did not have the burden of proof below nor does it argue that it met its burden. Rather, the City confuses its obligations to respond to a public records request under applicable statutes with meeting its burden of proof by arguing it did not fail to disclose any information because it was not asked. West Marine contends that the City must meet its burden of proof by presenting all documents relating to the private participation in the Project.[1]

While no public records request was made, none was necessary as the City acknowledged to the trial court that no agreement with the private funding sources was in place at the

[1] The City failed to include the May 2008 Ordinance (which acknowledged the need for private participation in the Project) in its petition for eminent domain or in its paperwork on public use and necessity. *See* CP 1-6; 7-48.

time of the hearing on public use and necessity. RP 15, Lines 14-17.

Here, the City has failed to meet its burden of proof by failing to provide the details of the private financing necessary for the Project.

> Because constitutional rights of a property owner are implicated, the burden of proof is *on the condemning agency* to demonstrate that the condemnation is for a public use and that the taking is necessary for that public use. *State ex rel. Wash. State Convention & Trade Ctr. v. Evans,* 136 Wn.2d 811, 822-23, 966 P.2d 1252 (1998) (*Convention Ctr.); King County v. Theilman,* 59 Wn.2d 586, 369 P.2d 503 (1962).

Public Utility Dist. No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC, 159 Wn.2d 555, 598, 151 P.3d 176 (2007) (J.M. Johnson, J. dissenting). It necessarily flows from this burden, that when a public project involves any private participation, the condemning authority is obligated, in order to meet its burden of proof, to provide all information relating to that private participation.

There is no information of any kind in the record before this court regarding what the City's arrangement is with the private party contributors. Unless and until this information is

disclosed, the constitutionally mandated balancing test cannot be employed.

B. THE CITY'S FOCUS IS IMPROPERLY LIMITED – THE INQUIRY DOES NOT STOP AT PHYSICAL OCCUPATION

The City further contends that because there will be no private physical use of the proposed expanded Mercer Street, that the Project necessarily passes a public use and necessity analysis. The City's argument is too narrow a focus; the constitutional inquiry does not stop at whom or what will be physically occupying the property subject to eminent domain. Rather, the project is viewed as a whole.

> A trial court should not put on blinders, as it were, to the project as a whole in adjudicating public use and necessity for the condemnation of various component parts of the project. ... It is only by considering the project as a whole that a court can properly adjudicate whether a component parcel is being condemned for a truly public use.

In re: City of Lynnwood, 118 Wn. App. 674, 681, 77 P.32d 378 (2003).

The City's reliance on *Steilacoom v. Thompson*, 69 Wn.2d 705, 419 P.2d 989 (1966) is misplaced. There, the project at issue was a subterranean sewer line which this court decided that since there was no private use of the sewer line

despite the fact that the line was private funded, that the project passed a challenge of public use and necessity. Again, there is no evidence that any property owner or possessor was displaced as a result of the construction of the sewer line as here. The City's reliance on *HTK Management, LLC v. Seattle Popular Monorail Authority*, 155 Wn.2d 612, 121 P.3d 1166 (2005) is similarly misplaced as that case did not involve any private funding of a public project as here.

In each of the following cases, there was no claimed private physical use of the condemned property yet the referenced court concluded that the project did not pass a challenge to public use and necessity. *King County v. Theilman*, 59 Wn.2d 586, 595, 369 P.2d 503 (1962) (roadway project); *State v. Superior Court*, 128 Wash. 79, 222 P. 208 (1924) (roadway project failed necessity analysis); *Cowlitz County v. Martin,* 142 Wn. App. 860, 177 P.3d 102, *review denied*, 164 Wn. 2d 1021 (2008) (roadway claim embedded in action under the Salmon Recovery Act). Even in *State v. Bank of California*, 5 Wn. App. 861, 491 P.2d 697 (1971) where the State of Washington sought to condemn a greenbelt along a roadway project, there was no evidence of private physical

occupation of the condemned property. Obviously, the constitutional inquiry involves more than mere physical occupation.

C. THE QUESTION OF NECESSITY WAS RAISED BELOW

At page 10 of its brief, the City complains that West Marine did not challenge the necessity element of the three point analysis at the trial court, apparently referring to RAP 9.12 (although not citing it) the special rule on summary judgment which limits appellate review to those issues brought to the attention of the trial court. The City is incorrect as "parties can clearly cite additional authority on appeal in support of issues they have already raised." *Brutsche v. City of Kent*, 164 Wn.2d 664, 193 P.3d 110, 115 n.3, (2008). Below, West Marine claimed, as it does in this court, that the City's failure to provide any evidence regarding the private funding rendered it impossible to determine the propriety of it and thus a fraud which was and is occurring. CP 447-449. If the court is inclined to agree with the City on this point, West Marine points out that this case involving a manifest error affecting a constitutional right which may be raised for the first time on appeal. RAP

2.5(a). Obviously, it is West Marine's contention that the trial court's decision is a manifest error which has affected its constitutional rights.

D. THE RECENTLY PASSED FEDERAL STIMULUS PACKAGE DOES NOT SOLVE THE CITY'S PROBLEM

The City contends that the Project is on some unidentified list of projects for which the recently passed American Recovery and Reinvestment Act of 2009[2] ("Recovery Act"). However, the City has not presented any evidence that this alleged federal funding will obviate the need for private participation in the Project. Thus, the City is asking this court to consider evidence which is not supported in the record and was not before the trial court. *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 615 n.1, 160 P.3d 31 (2007) ("We also decline to consider facts recited in the briefs but not supported by the record. Cf. RAP 10.3(a)(5), 13.4(c).").

Moreover, the City's claim by Ms. Angela Brady that this Project is part of the Recovery Act is not based in law. First, her declarations predate the adoption date of the Recovery Act.

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[2] As of the date of this brief, this recent legislation (which was signed by President Obama on February 17, 2009) has not been assigned a Public Law Number or a section of the United States Code although it is known as H.R. 1 and S.1 of the 111th United States Congress. It may be located at this link through the Library of Congress: http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.1:

Second, the Recovery Act describes types of projects but does not specifically list any transportation project. *See* H.R. 1, Title XII, Transportation & Housing and Urban Development, and Related Agencies, Department of Transportation. In short, Ms. Brady's statements that the Project will receive Federal stimulus money are nothing more than speculation.

Irrespective of any available funds under the Recovery Act, such information is utterly irrelevant to this court's consideration of the challenge on public use and necessity as noted by the City by its citation to *State ex rel. Sternoff v. Superior Court for King County*, 52 Wash.2d 282, 289, 325 P.2d 300, 305 (1958) where this court stated:

> Certain objections made by relators challenge the ability of the state to complete the contemplated highway. These matters relate to certain conditions which must be met before the state may qualify for apportioned Federal matching funds which will, in large measure, be used to finance construction. Relators fear that the highway presently proposed will not be constructed. But these matters are not germane to the issues before the court in determining the right of the condemner to an order adjudicating public use and necessity.

Thus, the existence or non-existence of Federal stimulus money is simply not relevant to this court's decision.

E. THE CITY IS NOT ENTITLED TO ATTORNEYS FEES OR COSTS

The City makes a claim for attorneys fees at page 12 of its brief without any citation to authority as a basis for the award although repeatedly states that West Marine's appeal is frivolous. This is not the case.

West Marine cannot find, and the City has not cited, any case in the Union addressing the fact pattern presented here—such a state of affairs, however, does not render an appeal frivolous. As is shown in the briefing, and with the oral argument at the trial court, debatable issues are presented. An appeal is frivolous when there are no debatable issues over which reasonable minds could differ and there is so little merit that the chance of reversal is slim. RAP 18.9(a); *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872, *review denied* 138 Wn.2d 1022 (1999). This is not such a case. The City is not entitled to fees under RAP 18.9 or other rule or statute relating to a frivolous appeal.

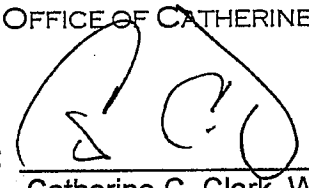
III. CONCLUSION

Again, the trial court should be reversed and this matter dismissed until the City finalizes and discloses all private participation in the Project at which point it can reinitiate its

action and a constitutional analysis on that private participation can be conducted.

Respectfully submitted this 19th day of February, 2009.

THE LAW OFFICE OF CATHERINE C. CLARK, PLLC



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Certificate of Service

I hereby certify that I caused the foregoing document to be served upon the below named individual in the identified manner on this 19th day of February, 2009:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Melissa Rogge

IN THE WASHINGTON SUPREME COURT

THE CITY OF SEATTLE

Plaintiff/Petitioner

vs

No. 82192-5
DECLARATION OF
EMAILED DOCUMENT
(DCLR)

HEGLUND; ET AL.

Defendant/Respondent

Pursuant to the provisions of GR 17, I declare as follows:

1. I am the party who received the foregoing facsimile transmission for filing.
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Dated: February 19, 2009, at Olympia, Washington.

Signature: _____

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